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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Order on Reconsideration of the Fourth Report and Order

WT Docket No. 97-82

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Amendment of the Commission's)	
Rules Regarding Installment)	WT Docket No. 97-82
Payment)	
Financing for Personal)	
Communications Services (PCS))	
Licenses)	
)	
Order on Reconsideration of the)	
Fourth Report and Order)	

OPPOSITION OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc., on behalf of itself and its affiliated entities ("collectively, "Leap"), hereby opposes the above-captioned petition for reconsideration of US West Wireless, LLC ("US West") and Sprint Spectrum L.P. d/b/a/ Sprint PCS ("Sprint")¹ of the Commission's recent *Order on Reconsideration*² of the *Fourth Report and Order*³ in WT Docket No. 97-82.

¹ In the Matter of Amendment of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Fourth Report and Order, Petition for Reconsideration*, WT Docket No. 97-82 (April 4, 2000) ("US West/Sprint Petition"); *see* Public Notice, DA 00-760, Wireless Telecommunications Bureau Sets Comment Schedule For Petitions for Reconsideration of the Order on Reconsideration of the Fourth Report and Order in WT Docket No. 97-82 (rel. April 5, 2000).

² In the Matter of Amendment of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Fourth Report and Order*, 65 Fed. Reg. 14,213 (Mar. 16, 2000) ("Order on Reconsideration").

³ In the Matter of Amendment of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report and Order*, 13 FCC Rcd 15,743 (1998).

I. INTRODUCTION AND SUMMARY

The Commission has before it a variety of petitions by the nation's largest wireless carriers⁴ that seek to use the Commission's announced upcoming reauction of C- and F-Block PCS licenses⁵ as the impetus for the Commission to eliminate its policy of reserving a portion of PCS spectrum as "Entrepreneur's Block" licenses – spectrum intended by the Commission, in accordance with Congressional mandate, to be used by small businesses and other Designated Entities to bring their unique variations of competition and innovation to the wireless telecommunications marketplace. US West and Sprint now have lobbied the instant petition for reconsideration into the mix, hoping that it will provide the Commission with (i) a more legally sustainable procedural vehicle to use in changing the rules, and (ii) an opportunity for the Commission to adopt a compromise proposal that US West and Sprint maintain is a better way to restructure, and to eliminate, Entrepreneur's Block spectrum. Leap submits that the US West/Sprint Petition is misplaced on both counts.

US West and Sprint, like Nextel and SBC before them, provide no persuasive reason why the current Entrepreneur's Block rules and spectrum allocation should be changed. To be sure, the Entrepreneur's Block has had a troubled history, but since the Commission's elimination of installment payments, and in the wake of a successful reauction of C-Block PCS licenses in Auction No. 22, the marketplace is proving that Entrepreneurial businesses are bringing innovative services to the public and are beginning to thrive.

⁴ The opportunistic assault on Entrepreneur's Block eligibility requirements begun by the SBC and Nextel petitions was supplemented and expanded in a different form by the filings of three additional large carriers, AT&T Wireless, BellSouth and Bell Atlantic Mobile, which seek a waiver of CMRS spectrum cap limitations. *See* Public Notice, *Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, DA 00-318 (rel. Feb. 18, 2000). The present filing continues the trend, and Leap hereby incorporates by reference its opposition filings in connection with these earlier-filed pending petitions.

⁵ Public Notice, "Auction of C and F Block Broadband PCS Licenses," DA 00-49 (Jan. 12, 2000).

On this score, Leap cautions the Commission not to let the "fatigue factor" that is increasingly attending C-Block eligibility issues cloud its view of the tangible benefits that Entrepreneurs such as Leap are bringing to consumers in the wireless marketplace as a *direct result* of the Commission's existing policy. The Commission should stay the course charted by it and Congress; now that the installment payment problem has been fixed, Entrepreneurial companies are positioned to bring tremendous benefits to consumers of wireless telecommunications services.

Apart from a few sweeping, very general pronouncements by the large carriers about an alleged need for additional capacity to assemble nationwide wireless footprints and to provide third-generation ("3G") wireless services, the "substantial record" that US West and Sprint assert warrants reconsideration of the *Order on Reconsideration* in fact offers little data or support for revisitation of the C- or F- Block eligibility rules. Indeed, contrary to the US West/Sprint Petition's assertion that the *Order on Reconsideration* "did not take into account relevant facts that had been presented in" the Nextel and SBC petitions, the Commission considered and rejected arguments in the *Fourth Report and Order* that are virtually *identical* to those raised in the pending Nextel and SBC filings.

With respect to the merits of the US West/Sprint compromise proposal, it is plain that the proposal in reality is no compromise at all. Simply put, regardless of how PCS spectrum blocks may be reconfigured, an approach that relies on bidding credits alone to ensure the participation of Entrepreneurs and small businesses in PCS services -- as the Commission itself has recognized -- will be woefully inadequate to permit these companies to bid at auction against the nation's largest wireless providers and telecommunications companies, whose deep pockets and ability to borrow money at a fraction of the cost that DEs must pay gives them the power to

outbid any DE at will, credits or not. The US West/Sprint proposal will effectively cede the balance of Entrepreneur's block spectrum to the nation's largest carriers, who most likely will use it to add more of the same mobile voice telephony to their collective base of existing wireless consumers (and block more competitive uses), rather than use the spectrum more efficiently or provide innovative services to new wireless users. This result is not in the public interest.

Leap continues to believe that there has been no adequate legal or policy basis proffered by any of the large wireless carriers that can justify eliminating the Entrepreneur's Block rules and policy. Nevertheless, if the Commission remains fixed on a course of changing the rules to provide large carriers with access to some additional spectrum at the expense of smaller companies, Leap believes that a compromise is possible that at least will mitigate the negative effects on small businesses and other Designated Entities, and that will ensure some measure of continued participation by these companies in spectrum-based services. The elements of Leap's proposal are as follows:

- All 30 MHz spectrum blocks in the upcoming reauction and future reauctions would be disaggregated into a 20 MHz block and a 10 MHz block.
- In the very largest U.S. markets – Basic Trading Areas covering more than 5 million pops -- there would continue to be an Entrepreneur's Block set aside of 10 MHz. All qualified bidders, including non-Entrepreneurs, would be eligible to bid for new disaggregated 20 MHz licenses in each of these markets.
- Below 5 million pops, the new 20 MHz disaggregated license derived from former 30 MHz licenses would be set aside for Entrepreneurs, and the new disaggregated 10 MHz licenses derived from former 30 MHz licenses would be made available to all qualified bidders, including non-Entrepreneurs.
- Existing 10 MHz F-Block and 15 MHz C-Block licenses would remain set aside as Entrepreneur's Block licenses.

- Entities qualifying as Very Small Businesses and Small Businesses under FCC rules in all circumstances would be afforded a 45% or 35% bidding credit, respectively, for all licenses to be auctioned.
- The existing Commercial Mobile Radio Service (CMRS) spectrum cap (45 MHz in urban areas and 55 MHz in rural areas) would remain in place.

Further elaboration on this proposal is provided below.

II. THERE HAVE BEEN NO NEW FACTS PRESENTED THAT JUSTIFY REVISITING THE *FOURTH REPORT AND ORDER* OR THE COMMISSION'S ENTREPRENEUR'S BLOCK FRAMEWORK

As a threshold matter, the US West/Sprint Petition is procedurally deficient.⁶

According to the Section 1.429 of the Commission's rules (the rule applicable here),⁷ a petition for reconsideration that purports to rely on facts which have not been previously presented to the Commission will be granted only in certain narrow circumstances.⁸ Here, US West and Sprint seek reconsideration of the *Order on Reconsideration*, and the Commission's Entrepreneur's Block eligibility rules. The petitioners claim that the *Order on Reconsideration* "did not take into account relevant facts that had been presented in petitions filed by Nextel Communications and SBC Communications shortly before the Order was adopted," nor "could the Order take into account the record subsequently compiled in response to the Wireless Telecommunications Bureau's public notice seeking comment on these petitions – including

⁶ Leap also joins in the procedural objections summarized in the Opposition of the Personal Communications Industry Association, also being filed today.

⁷ The *Fourth Report and Order* and the *Order on Reconsideration* were orders issued in a rulemaking proceeding, and therefore governed by 47 C.F.R. § 1.429, rather than the rule section (47 C.F.R. § 1.106) cited in the US West/Sprint Petition.

⁸ The Commission rules state that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only where: (1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. 47 C.F.R. § 1.429.

comments, replies, proposals and *ex parte* filings."⁹ Yet, these very general statements provide no basis for revisiting any aspect of the *Fourth Report and Order* or the Commission's Entrepreneur's Block eligibility rules, and are not accurate in any event. Contrary to the assertion of US West and Sprint, the Commission has dealt *repeatedly* with the *precise* arguments that Nextel and SBC have resurrected in their petitions, and has concluded repeatedly that there has been no valid public interest reason proffered to justify deviating from the policy balance embodied in maintaining the Entrepreneur's Block eligibility restriction.¹⁰ Indeed, when Nextel on reconsideration argued that PCS licenses subject to reauction should be opened to "all qualified bidders," the FCC again found – just a year and a half ago, and in the very order that is at the root of the current US West/Sprint Petition – that the record provided "no basis to alter our decision" regarding the preservation of Entrepreneur's Block eligibility restrictions.¹¹

The fundamental question raised by the US West/Sprint Petition, and the SBC, Nextel and other petitions before it, is the following:

What changes in the wireless marketplace have occurred since the Commission's most recent affirmations of the Entrepreneur's Block eligibility and spectrum cap rules (that is, August 1998, and August 1999, respectively) that should cause the Commission to sacrifice the current and potential benefits to carriers and consumers of the Entrepreneur's Block regime?

⁹ US West/Sprint Petition at 2.

¹⁰ See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82 (rel. Mar. 24, 1998), at ¶ 69.

¹¹ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Fourth Report and Order*, WT Docket No. 97-82 (rel. Aug. 19, 1998), at ¶ 16.

US West and Sprint claim that the "comprehensive record" compiled to date in connection with the SBC and Nextel petitions "addresses the extensive changes that have taken place in the wireless telecommunications over the last half-dozen years"¹² – changes that purportedly justify a radical alteration of the Entrepreneur's Block program. However, the reality is that the record to which US West and Sprint refer contains only vague and self-serving assertions of capacity need by large carriers that simply do not hold up under scrutiny:

- *"For example, carriers may need to extend their existing service regionally, to accommodate growing demand . . ."*¹³

Leap does not understand why this assertion, even if it were supported by data or record evidence (which it is not), warrants blanket elimination of the Entrepreneur's Blocks.

As a threshold matter, it is important to recognize that the trend towards regional or national expansion in the provision of CMRS services was *expressly accounted for* in the existing PCS allocation. In 1993, the Commission stated:

[T]here has been a great amount of consolidation of the MSA/RSA markets in the cellular service, which may have been driven by the greater economies of scale and scope in larger cellular operations. This consolidation has resulted in unproductive regulatory and transaction costs in the assignment process for cellular. We believe that larger PCS service areas, such as MTAs and BTAs, will minimize these problems. In addition, large PCS service areas also may facilitate regional and nationwide roaming; allow licensees to tailor their systems to the natural geographic dimensions of PCS markets; reduce the cost of interference coordination between PCS licensees; and simplify the coordination of technical standards. Further, BTAs and MTAs offer large service areas and therefore are complementary with and will facilitate the coordination and negotiation processes associated

¹² US West/Sprint Petition at 3.

¹³ *Id.* at 5.

with the microwave relocation activities that will be necessary in many cases.¹⁴

Thus, the Commission understood even at the time that spectrum was allocated to PCS that the trend in the mobile wireless telephony market was towards consolidation into large regional and nationwide service areas. The Commission nonetheless decided that the public interest would be served by allocating a limited portion of PCS spectrum to Entrepreneurs. The fact that continued consolidation has occurred as the Commission predicted is hardly a "new" market condition or changed circumstance that warrants a reversal of that decision. If anything, the increased concentration of licenses and possible market power resulting from such consolidation is all the more reason to preserve the diversity of CMRS service provision promoted by the Entrepreneur's Block policy, not to eradicate it.

In addition, it is also clear from marketplace developments that the creation of nationwide footprints does *not* require elimination of the Entrepreneur's Block. Just weeks ago, the Commission approved two separate merger transactions, between Bell Atlantic Corporation and Vodafone AirTouch Plc,¹⁵ and between VoiceStream Wireless Corporation and Aerial Communications, Inc., that will result in the creation of "two new national wireless carriers."¹⁶ These actions were followed by the announcement of the agreement by BellSouth and SBC Communications to combine their wireless operations to create the second largest wireless

¹⁴ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, 7732, ¶ 74 (1993) (footnotes omitted).

¹⁵ Bell Atlantic and Vodafone have announced that the brand name for this joint venture will be "Verizon Wireless." See *Communications Daily*, "Verizon Wireless Starts Service With Nationwide Pricing Plan" (April 5, 2000).

¹⁶ Public Notice, FCC Bureaus Approve Bell Atlantic Vodafone and VoiceStream/Aerial License Transfers and Assignments – Two New National Wireless Competitors to be Created (rel. Mar. 30, 2000).

carrier in the country.¹⁷ And carriers such as AT&T and Nextel continue to provide ubiquitous nationwide service. The wireless marketplace plainly is addressing the nationwide footprint demand without the need for Entrepreneur's Block spectrum to be sacrificed.

- "[C]arriers may need "to provide 3G wireless services where their existing spectrum is insufficient for 3G as well as existing services."¹⁸

This speculative claim, also unaccompanied by any evidence or supporting data, does not warrant eliminating opportunities for Designated Entities to acquire Entrepreneur's Block spectrum.

Just six months ago, the Commission found that few carriers have accumulated as much as 45 MHz of spectrum in any one market and that, in general, "carriers with 45 MHz are not currently using their entire spectrum allocation."¹⁹ This finding still appears to be accurate and has not been refuted in the current record. Nor have the petitioners convincingly argued that competition—and the opportunity that C-Block spectrum represents for small businesses—must be sacrificed to implement 3G wireless data systems. They produce no evidence whatsoever that the 45 MHz allowed under existing spectrum cap rules is inadequate for this purpose, especially given that the precise spectrum needs of 3G are unknown.²⁰ Indeed, *Sprint itself* has acknowledged that current technology (and spectrum) will "suffice for many years,"²¹ and that

¹⁷ See Communications Daily, "BellSouth and SBC Merge U.S. Wireless Operations" (April 6, 2000).

¹⁸ US West/Sprint Petition at 5.

¹⁹ 1999 Spectrum Cap Order at ¶ 65.

²⁰ See, e.g., *Id.* at ¶ 61 ("the assertions in the record along these lines are very general and do not provide any concrete evidence regarding the amount of spectrum that will be needed for 3G technologies or exactly when carriers will need access to that spectrum").

²¹ Sprint PCS Opposition, DA 00-318, at 5 (quoting *Global Wireless*, "GSM Networks to Survive in 3G Era" at 17 (Jan. 1, 2000)).

the actual spectrum needs for 3G are unlikely to require the large amounts of spectrum requested by the large carriers.²²

Voice capacity using digital transmission technology has continued to increase dramatically in the past 5 years. While there were periods during the conversion to digital where carriers were not realizing large capacity increases, the technology advances and "re-tooling" of the vendors during the past several years has yielded tremendous gains. New subscribers this year, using the latest CDMA digital upgrades, use less than 1/10 of the network capacity per minute of use than analog subscribers, and less than 1/2 the capacity per minute of use of those added as recently as last year using first generation digital technology. Indeed, Leap's "Cricket" service has made full use of the efficiency afforded by new technology to provide unlimited phone use at a low price. Further technology improvements expected this year and next include the evolution of existing systems (in the existing spectrum) that will provide 70% more network capacity through the 1XRTT air interface (the first phase of 3G for CDMA), and 45% additional capacity through new vocoders. The fact is that high capacity voice technology is here today, and will improve tomorrow.

Cellular carriers, however, are not converting customers to digital quickly, instead allowing a slow migration to occur - and keeping analog prices high. As reported in *Wireless Week*, more than 50% of Bell Atlantic Mobile's existing subscriber base remains analog.²³ Reports from other large wireless carriers are similar. Thus, these carriers must use the majority of their existing 25 MHz of cellular spectrum to accommodate less efficient technology.

²² *Id.* at 4-5.

²³ "CDMA: the Secret of BAMS' Success," *Wireless Week* (April 3, 2000), at 46.

While continuing to support analog service may make business sense to large carriers, such inefficient use of the spectrum should not be rewarded with an additional spectrum transfer from Designated Entities. And this is especially the case when other sources of spectrum are clearly available, such as the Commission's 700 MHz auction next month.

Finally, none of the petitioners' arguments leads to the conclusion that only the largest carriers, as opposed to Entrepreneurs, should be able to obtain more spectrum to offer 3G services. To the contrary, as the Commission concluded just six months ago, permitting the largest carriers to acquire vast amounts of spectrum at some point begins to work *against* the goal of developing innovative new services, because the market has “fewer competitors, less innovation and experimentation, higher prices and lower quality.”²⁴ Permitting Entrepreneurs to have continued access to spectrum for the delivery of combined voice and data service promotes diversity of service in the wireless marketplace and is in the public interest.

- *Leaving DE Eligibility rules in place will "lead to inefficient use of the spectrum, because new entrants will have to bid for a full 30 MHz of spectrum, exceeding what they need for a start-up PCS operation, instead of having the opportunity to bid for 10 or 20 MHz and allowing the remaining spectrum to go to others who can put it to better or more efficient use."*²⁵

This is perhaps the most outrageous and patronizing supercarrier claim of all. The assertion that Entrepreneurs are less able than larger carriers to use spectrum blocks larger than 10 MHz rapidly and efficiently is nonsense.

Leap, for example, has been rapidly acquiring and deploying the Cricket voice service using a range of spectrum block sizes. As a participant and winner of 36 C-Block licenses in the FCC's April 1999 reauction of C-Block PCS spectrum, Leap has introduced into

²⁴ 1999 Spectrum Cap Order at ¶ 62 (citations omitted).

²⁵ US West/Sprint Petition at 7.

the wireless marketplace an innovative service model that offers consumers a low flat-rate of \$29.95 per month. The plan is in many ways the opposite of the ubiquitous national or regional plans offered by the large super-carriers. The Cricket “around town phone” is fundamentally local: it works only in the local service area, with no roaming capability, and any long distance calls must be placed through a prepaid calling arrangement. By simplifying its rate structure and billing costs, and by eliminating the costs of acquiring and building a national roaming network, Leap is able to offer to consumers an exceptional value.²⁶

Leap caters to a market segment that the larger wireless players generally overlook. Leap’s markets are generally small- to mid-sized metropolitan areas that are regarded within the industry as “secondary markets” with less potential for wireless growth. These markets may have fewer of the business executives and professionals to whom the larger carriers tailor their plans, but the Cricket service plan deliberately caters to the mass market. Cricket reaches out to those who do not need, and in many cases could not pay for, the service offerings of the national super carriers. Approximately 44 percent of Cricket customers work in blue-collar, clerical or service jobs, and for many of these customers Cricket is the *only* service that can meet their needs.

Leap expects that, with a minimum of 15-20 MHz, it will be able to expand the already-innovative, flat rate Cricket voice offering to include data services in a fashion that the large mobile wireless carriers cannot or will not choose to replicate. And Leap's track record to

²⁶ Indeed, in addition to targeting and increasing penetration among traditionally underserved populations, Cricket’s service plan offers a realistic alternative to landline telephony. At \$29.95 a month, Cricket is priced competitively with local residential rates. Thus, for example, a family that might otherwise add a second wireline (for its teenagers, perhaps, or to supplement a line that is increasingly used for Internet access) could subscribe to Cricket instead – saving on installation costs and acquiring the convenience of mobile telephony. The idea of a complete wireless landline replacement is particularly attractive for college students, servicemen, and others who are often away from their residence.

date shows the skewed logic underlying the assertion that large carriers will make more efficient use of larger blocks of spectrum. Indeed, in many instances, it is cheaper for the large wireless carriers to pay for spectrum, even at a premium, to support aging infrastructure (and in some cases, a significant amount of inefficient analog spectrum use), rather than to upgrade infrastructure and equipment to become more spectrally efficient. Carriers such as Leap are proving that Entrepreneurial companies are indeed building innovative services from the ground up, and are introducing cheaper, more efficient and more affordable wireless service to a significant class of wireless consumers that has never used wireless before. Limiting or cutting off entirely the growth of such services merely to allow large carriers to absorb more spectrum to support existing mobile wireless operations is not "efficient" spectrum use -- and it is not in the public interest.

* * * *

The Commission's 1997 restructuring of PCS financing options caused it to reassess the correctness of the threshold policy judgment that some PCS spectrum could and should be developed by smaller entities capable of bringing innovation and competition to the services offered by large incumbent providers. In implementing its restructuring options, the Commission considered and balanced the following policy goals: (i) maintaining the integrity of its rules and auction processes; (ii) ensuring fairness "to all participants in our auctions, including those who won and those who did not, as well as licensees in competing services"; (iii) resolving issues now in a manner that does not merely postpone the problem; (iv) "[c]omplying with the mandate of our auction authority in Section 309(j) of the Communications Act . . . that we ensure 'that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide

variety of applicants, including small businesses. . . ."; and (v) promoting economic opportunity and competition in the marketplace.²⁷ After assessing these factors, the Commission affirmed the viability of the Entrepreneur's Blocks.

Although the US West/Sprint Petition suggests in conclusory fashion that profound changes have occurred that should cause the Commission to modify this policy balance, these petitioners simply do not support their claims with sufficient data or explanation. Nor do they address the fact that in April 1999, the Commission completed a successful reauction of Entrepreneur's Block licenses consonant with its aforementioned policy goals.²⁸ As the success of this reauction shows, any problem with the Commission's original C-Block rules has since been remedied. There is no rational basis to reconsider the rules.

III. THE US WEST/SPRINT DISAGGREGATION PROPOSAL WOULD EVISCERATE THE COMMISSION'S ENTREPRENEUR'S BLOCK POLICY

The primary purpose of the US/West Sprint Petition is to present a compromise proposal that these parties claim will better serve the objectives of Congress in granting the Commission auction authority than the Commission's existing Entrepreneur's Block auction framework. The proposal essentially suggests that 30 MHz C-Block PCS licenses returned to the Commission for reauction should be disaggregated into 10 MHz licenses and opened up to all qualified bidders. This proposal, it is asserted, would continue to benefit Entrepreneurial companies and small businesses because there would be more licenses available for

²⁷ *Id.* at ¶ 2.

²⁸ Apart from the prospect of subjecting the Entrepreneur's Block licenses to more litigation regarding what would assuredly be an inexplicable reversal of the FCC's rules and policy regarding Designated Entities, there are sound public policy reasons not to do so. The large incumbents already control the A- and B-Block cellular licenses, virtually all wide-area SMR spectrum, and the A-, B-, D- and E-Block PCS licenses, and under the Commission's recently-announced rules likely will soon control twelve 700 MHz licenses. To lift the eligibility restriction and allow them to acquire C- and F-Block licenses is unnecessary, and is antithetical to the notion of increasing competition, innovation and diversity in the wireless marketplace in the fashion that Congress intended when it enacted Section 309(j).

Entrepreneurs to obtain, and because Entrepreneurs would still be afforded bidding credits to buy them.

In Leap's view, the US West/Sprint proposal eviscerates the Entrepreneur's Block policy by eliminating any set aside of spectrum for Entrepreneurial companies. Although U.S. West and Sprint assert that an increased number of smaller 10 MHz licenses may provide DEs with more license acquisition opportunities, and will be more affordable than larger licenses, Leap strongly believes that these claimed benefits are wholly illusory. A main feature of the Commission's simultaneous multiple round auction methodology is that it facilitates license aggregation, and there is absolutely no reason to expect that the large supercarriers will not seek to do so at every opportunity in the reauction, regardless of the size of the spectrum blocks created (and particularly if the CMRS spectrum cap is lifted as the large carriers have proposed). US West and Sprint certainly offer no facts or data to suggest otherwise.

More fundamentally, the faith that the US West and Sprint place in bidding credits as the sole means for ensuring auction participation by small businesses and other DEs is simply not warranted. Several years ago, the Commission reasoned that designating a portion of the PCS spectrum for entrepreneurial companies to develop would promote Congressional objectives "by creating significant opportunities for designated entities and other entrepreneurs to ensure that licenses are widely disbursed to entities that can rapidly deploy broadband PCS services."²⁹ In so doing, the Commission determined that designated entities

²⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket 93-253 (rel. Nov. 23, 1994), at ¶ 13.

could not "realize meaningful opportunities for participation in broadband PCS" using monetary incentives alone.³⁰ Recognizing that the virtually unlimited resources of the dominant carriers likely would render ineffective such incentives, the Commission provided "a limitation on the size of the entities designated entities will bid against."³¹ After creating an exhaustive administrative record on this subject, the Commission concluded that bidding credits or similar measures alone would *not* be enough to create the diversity in the wireless marketplace that Congress envisioned: "[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. *Without the insulation of the entrepreneur's block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.*"³²

Neither the US West/Sprint Petition nor the record that has been created to date in connection with the pending Nextel and SBC filings offers any evidence to show why the Commission's predictive judgment as to bidding credits should now be reversed. And the Commission should make no mistake: a regime of bidding credits-only will sound the death knell for Entrepreneurial opportunities in PCS.

³⁰ *Id.* at ¶ 16.

³¹ *Id.* The Commission has found "that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business." In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order* (rel. Jul. 15, 1994), at ¶ 121.

³² *Id.* at ¶ 16 (emphasis supplied).

IV. IF THE COMMISSION INSISTS ON CHANGING THE RULES, A BETTER COMPROMISE IS ACHIEVABLE THAT WILL MITIGATE THE HARMFUL EFFECTS OF THE RULE CHANGES ON DESIGNATED ENTITIES

Leap continues to believe that there has been no adequate legal or policy basis proffered by any of the large wireless carriers that can justify eliminating the Entrepreneur's Block rules and policy. Nevertheless, Leap believes that if the Commission remains fixed on a course of changing the rules to provide large carriers with access to some additional spectrum at the expense of smaller companies, a compromise is possible that at least will mitigate the negative effects on small businesses and other Designated Entities, and will ensure some measure of continued participation in by these companies in spectrum-based services. The elements of Leap's proposal are presented below.

A. All 30 MHz spectrum blocks in the upcoming reauction would be disaggregated into a 20 MHz block and a 10 MHz block.

In the event that the Commission decides that large carriers should be permitted to access a portion of the spectrum currently allocated to the C-Block, Leap believes that the spectrum can be sensibly disaggregated into spectrum blocks that can be easily integrated into large carrier businesses, while also ensuring the continued opportunity for Entrepreneurs to grow their businesses and provide both voice and data services. Thus, to the extent that the Commission reauctions 30 MHz C-Block licenses, Leap believes that these should be disaggregated into one 20 MHz license block and one 10 MHz license block. The specifics as to how those blocks would be reaucted are presented below.

- B. In the very largest U.S. markets – Basic Trading Areas covering more than 5 million pops -- there would continue to be a minimum of 10 MHz of spectrum set aside for Entrepreneurs, but all qualified bidders, including non-Entrepreneurs, would be eligible to bid for 20 MHz disaggregated licenses in each of these markets.**

Leap is familiar with various informal and *ex parte* compromise proposals that would relax or loosen Entrepreneur's Block eligibility restrictions in the more populous U.S. markets, on the theory that (i) small businesses and other DE are less likely to deploy service in these markets, and (ii) these markets are the most capacity constrained, and the ones in which large carriers arguably are in the most need of additional spectrum.

Leap finds such a population cutoff objectionable for several reasons. First, Leap takes issue with the assumption that DEs would not find it desirable or would not be able to deploy service in even the largest of markets. While that assumption might be valid if a smaller carrier were simply intending to enter the market as a fifth or sixth mobile wireless provider, it is not valid if the DE is providing an innovative service that is not being provided by other carriers. Such is the case with Cricket service today.

A second, and related, objection pertains to the line that the Commission would draw between "large" and "small" markets. For example, even a cut-off of 2,000,000 pops would render a severe disservice to Entrepreneurs intent on serving all but perhaps the very largest U.S. markets. For example, Phoenix, Arizona, Denver, Colorado and Pittsburgh, Pennsylvania are all cities with more than 2 million subscribers where Leap has either acquired or has pending agreements to acquire PCS spectrum, and in which Leap intends to roll out the Cricket service model. And while Leap has no current plans to serve the very largest markets in the United States (*i.e.*, over 5 million pops) there are other Entrepreneurs that have indicated their intent to do so.

In Leap's view, any geographic service cut-off that completely eliminates Entrepreneurial access to any individual U.S. market – for example, by limiting Entrepreneurs only to bidding credits above a certain population level-- is inherently arbitrary and needlessly discriminatory towards DEs. However, if the Commission indeed has a rational basis to conclude that additional capacity is needed for large carriers to expand service in the nation's largest markets, Leap believes that the Commission should continue to retain a 10 MHz set aside for DEs in these markets, but open up the disaggregated 20 MHz license derived from former 30 MHz C-Block licenses to all qualified bidders. Leap proposes that the Commission's geographic threshold for this determination be 5 million pops, which would allow carriers in the nation's largest markets – such as New York, Los Angeles, San Francisco, and Philadelphia -- to access a tremendous amount of additional spectrum, while preserving the ability of Entrepreneurs to introduce innovative niche services into these markets.

C. Below 5 million pops, the new 20 MHz disaggregated license derived from former 30 MHz licenses would be set aside for Entrepreneurs, and the new disaggregated 10 MHz licenses derived from former 30 MHz licenses would be made available to all qualified bidders, including non-Entrepreneurs.

Below 5 million pops, the Commission must weigh the benefits of providing large carriers with access to spectrum against the prospect of decreasing the spectrum currently made available to Entrepreneurs. Given that markets below 5 million pops are the primary markets in which DEs are deploying, and will continue to be so, it is important that the Commission not only continue to provide these companies with access to Entrepreneur's Block spectrum, but also ensure that these companies maintain a viable spectrum allocation that will provide them with the ability to bring innovative voice and data offerings to market.

Unlike larger carriers, newer Entrepreneurial companies have the advantage of being able to deploy the most current technology in conjunction with targeted, efficiently

designed systems. Thus, while a nationwide supercarrier may need to add 10 MHz of spectrum to an existing 30 MHz allocation to deploy wireless data offerings, a newer entrant such as Leap can deploy an innovative voice and data offering using far less spectrum, such as 15-20 MHz.

For this same reason, however, relegating DEs to 10 MHz only should not be an option. Even using the most efficient technology, combined voice and data is a tall order. DEs should not be denied the opportunity to roll out such combined offerings. This was an opportunity guaranteed them in the existing C-Block allocation (either 15 or 30 MHz licenses), and it should not be taken away now.

D. Existing 10 MHz F-Block and 15 MHz C-Block licenses should remain set aside as Entrepreneur's Block licenses.

The Commission should preserve existing F-Block and disaggregated C-Block allocations. As a part of the balance in reallocating Entrepreneur's Block spectrum to larger carriers, it is important and pro-competitive for these Entrepreneur's Block spectrum allocations to be preserved.

E. Entities qualifying as Very Small Businesses and Small Businesses under FCC rules in all circumstances would be afforded bidding credits for all licenses to be auctioned.

As stated earlier, Leap views the implementation of bidding credits as useful but insufficient from the standpoint of preserving the opportunities of small businesses and Entrepreneurial companies to participate in and grow spectrum-based services. Nevertheless, Leap believes that bidding credits should be offered to those companies that qualify as Small Businesses and Very Small Businesses under Commission rules in all circumstances, which may provide DEs with some useful aid at the margins in the reauction, particularly in acquiring

smaller markets. Leap proposes a 45% bidding credit for Very Small Businesses, and a 35% bidding credit for Small Businesses, as defined by the Commission.

F. The existing Commercial Mobile Radio Service (CMRS) spectrum cap (45 MHz in urban areas and 55 MHz in rural areas) would remain in place.

Finally, although the US West/Sprint Petition takes no position on the issue,³³ as Leap and many carriers have already urged, the existing CMRS spectrum cap should remain in place for the upcoming scheduled C- and F-Block reauction.

On September 22, 1999, approximately six months ago, the Commission released its Report and Order completing a re-assessment of the CMRS spectrum cap, and concluded:

After careful analysis and extensive review of the rules and record in this proceeding, we conclude that at this time the spectrum cap . . . rule [] continue[s] to be necessary to promote and protect competition in CMRS markets.³⁴

There is no reason or basis to revisit the merits of that recent decision, which affirms the sound policy judgment that there should be a limit on the amount of CMRS spectrum that a single carrier can control in a particular geographic market.

V. CONCLUSION

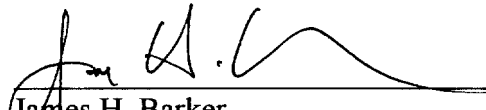
The US/West Sprint Petition should be denied. Leap once again submits that no sound legal or policy basis has been proffered for effecting sweeping change of the Commission's Entrepreneur's Block rules. However, if the Commission does insist upon moving forward with changes to its Entrepreneur's Block rules and policy, those changes should not be ones that eviscerate the benefits that Entrepreneurial companies are bringing and

³³ US West/Sprint Petition at 9 n.19.

³⁴ See 1998 Biennial Regulatory Review: Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, 1999 FCC LEXIS 4623 (rel. Sept. 22, 1999) ("1999 Spectrum Cap Order").

will continue to bring to U.S. consumers. Accordingly, Leap in the event that the rules are revised, Leap urges the Commission to do so in accordance with the proposals set forth above.

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